UNITED MALAYAN BANKING CORPORATION BERHAD

v.

SOBRI HOLDINGS SDN. BHD.

HIGH COURT, KUALA LUMPUR
DATO' HAJI ABDUL MALEK BIN HAJI AHMAD J.
[COMPANIES WINDING-UP NO D5-28-105-93]
21 FEBRUARY 1994

COMPANY LAW: Winding-up petition - Discrepancy as to amount owed - Whether respondent was insolvent - Whether respondent's refusal to pay due to the discrepancy was the same as an inability to pay.

The petitioner had obtained final judgment against the respondent. The respondent settled part of the judgment debt and the petitioner issued a statement to the respondent confirming an outstanding balance of RM6,078.79. This was followed by similar statements over the years confirming the amount outstanding.

The petitioner's solicitors subsequently sent a s. 218 Companies Act 1965 notice to the respondents demanding a sum of RM39,234.34 being the balance due to the petitioner. The respondent failed to pay the said sum and the petitioner applied to wind up the respondent on the basis of insolvency and inability to pay its debts. The petitioner explained the discrepancy in the amount owing as per the statements issued to the respondent and the notice by saying that it was merely a matter of internal book-keeping.

Held:

[1] In the light of the unchallenged averment of the respondent's director that the respondent have a paid up capital of RM5 million in equity holdings in several other companies which are expected to generate profits and that they are ready and willing to pay the RM6,078.79, there is no evidence that the respondent is insolvent or unable to pay its debts. At the most, they can only be said to have refused to pay the amount owing because of the discrepancies and refusal is not the same as inability.

[2] The petitioner has been guilty of delay in issuing the petition. The delay of four years and four months combined with the disparity of the accounts kept by the petitioner in relation to the respondent vitiates the petition itself as one is not in a position to know what is the correct amount due.

[3] The petitioner is not entitled to a winding up order based on the amount in the notice dated 11 December 1992 in view of the unexplained discrepancies in their accounts and the benefit of the doubt should be given to the respondent by holding that the amount stated in the statements they had been receiving is the correct balance.

[Respondent ordered to make payment of RM6,078.79 to petitioner. Matter adjourned pending disposal of appeal in the Supreme Court].

Cases referred to:
Re Pentasia (Pte.) Ltd. [1979] 2 MLJ 59 ***(refd)***
Muthiah v. Lee Kor Fan [1966] 1 MLJ 105 ***(refd)***
In Re Tweeds Garages Ltd. [1962] 1 Ch. 406 ***(dist)***
Industrial & Commercial Realty Co. Ltd. v. Merchant Credit Pte. Ltd. [1980] 1 MLJ 208 ***(refd)***

Legislation referred to:
Companies Act 1965, s. 218

Other source referred to:
The Discipline of Law, Lord Denning, pp. 217, 223
Companies Act, Buckley

For the petitioner - Saidah Rastam; M/s. Skrine & Co.
For the respondent - S.P. Chuah; M/s. Thevin Chandran & Wong

JUDGMENT

Haji Abdul Malek Bin Haji Ahmad J:
Only one issue arises here and that is whether the respondent is liable to pay the petitioner RM39,243.34, as stated in the petition, or RM6,078.79, as alleged by the respondent in his affidivit in opposition to the said petition.

The petition had categorically stated that the nominal capital of the respondent is RM10 million divided into ten million shares of RM1 each. The amount of capital paid up or credited as paid up is RM6,425,267. On 14 July 1988, the petitioner had obtained final judgment against the respondent in Kuala Lumpur High Court Civil Suit No D4-23-1000-88 in the sum of RM322,125.71 together with interest thereon at the rate of 11.5 per cent per annum with monthly rests from 1 March 1988 until the date of full realisation and costs of RM225. On 16 December 1992, the petitioner's solicitors had served a demand dated 11 December 1992 on the respondent by leaving it at the respondent's

registered office. The demand was for RM39,243.34 only being the balance then due and owing to the petitioner as at the 31 October 1992. Despite the lapse of three weeks, the respondent had neglected to pay and on the basis of insolvency and the inability to pay its debts, the petitioner had applied to wind up the respondent.

By affidavit filed on 2 October 1993, the director of the respondent had affirmed that, after judgment was obtained, the petitioner had proceeded to obtain an order for sale on a piece of property, which they were holding as security, which was subsequently sold by private treaty for RM378,073.40. To support this averment, he had produced the statement of account issued by the petitioner in the name of the respondent numbered 0135-10505-3 dated 30 November 1990 which showed the original balance of RM384,152.19, a credit entry of RM378,073.40 and an outstanding balance of RM6,078.79. This was followed by similar statements over the years including the standard letter on the confirmation of balance of minus RM6,078.79 dated 31 July 1992.

However, eighteen days earlier on 13 July 1992, the petitioner's solicitors had sent the notice under s. 218 of the Companies Act 1965 (hereinafter "the Act") demanding RM74,486.89, inclusive of RM225 the amount owing as at 30 June 1992. This was subsequently followed by a similar notice as stated in the petition for RM39,243.34 as at 31 October 1992. On 14 November 1990, the said director of the respondent had written to the petitioner asking them to write off the balance of RM7,420.16 which he had calculated as the amount actually owing. On being questioned as regards the discrepancies in their accounts, the petitioner's solicitors' letter dated 10 March 1993 had clarified that "the statement of account sent to your client is in respect of their internal book-keeping and reflects the Bank Negara Guideline that bad debts such as this should be written-off for tax purpose". This was amended by a follow-up letter dated 18 March 1993 stating "the statement of accounts sent to your clients reflect our client's internal book-keeping and it does not affect your client's liability under the judgment".

Basically, I am quite apalled that a bank of the petitioner's renown and repute, for whatever reason, could issue two separate statements of account for the same account number with different balances, send one version of the accounts to the relevant customer and keep the other one for their own records, instruct their solicitors to send out two statutory notices of demand to the same respondent in the same year six months apart with the first amount being RM35,243.55 higher than the second despite no money being paid in the intervening six months, and to explain all these discrepancies, in two separate letters, written eight days apart, by saying that it was merely a matter of internal book-keeping.

A painstaking perusal of the petition and the respondent's affidavit will show that apart from the different statements of account as regards the one sent to the respondent and the one maintained by the petitioner, the accompanying statements annexed by the petitioner to the two statutory notices of demand, both of which start from March 1988 but one ends in June 1992 and the other in October 1992, are not exactly the same as although at a glance the only difference is the credit entry of RM25,000 in the latter, the outstanding total is different by RM36,719.72 as at 30 June 1992. That means the petitioner had not two but three separate accounts for the respondent and they themselves were confused by the two kept by them.

The only inference in these circumstances is that something is drastically wrong with the keeping of accounts by the petitioner and in the light of the unchallenged averment of the respondent's director that the respondent have a paid up capital of RM5 million in equity holdings in several other companies which are expected to generate profits and that they are ready and willing to pay the RM6,078.79, there is not an iota of evidence that the respondent is insolvent or unable to pay its debts. At the most, they can only be said to have refused to pay the amount owing because of the discrepancies and refusal surely is not quite the same as inability. Even if they had neglected to pay, this cannot amount to being unable to pay.

Further, the petitioner has certainly been guilty of delay in issuing the petition, which may have been due to their own confusion in the matter, and although learned Counsel for the petitioner kept harping on the fact that their petition was in order as all they had asked for is the balance of the judgment sum due and that the errors in the statements could not affect liability, the

delay of four years and four months combined with the disparity of the accounts kept by the petitioner in relation to the respondent vitiates the petition itself as one is not in a position to know what is the correct amount due and that includes the petitioner themselves! This, as has been pointed out earlier, is clearly shown by the fact that they had issued two separate notices under s. 218 of the Act in the same year. In addition, both the different amounts on which the notices were based do not tally with the statement of account the respondent had been receiving all along. In the same vein, the respondent had been guilty of not paying up the RM6,078.79 immediately which could have had the effect of the petitioner closing their account books in this matter much earlier.

In these circumstances, to my mind, the doctrine of estoppel applies. Lord Denning in his book **The Discipline of the Law** at page 217 has said "Estoppel is not a rule of evidence. It is not a cause of action. It is a principle of justice and of equity. It comes to this: when a man, by his words or conduct, has led another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be unjust or inequitable for him to do so. Dixon J put it in these words: 'The principle upon which estoppel *in pais* is founded is that the law should not permit an unjust departure by a party from an assumption of fact which he has caused another party to adopt or accept for the purpose of their legal relations'.". At page 223, the distinguished author had reiterated that "It is a principle of justice and of equity. It comes to this: when a man, by his words or conduct, has led another to believe that he may safely act on the faith of them - and the other does act on them - he will not be allowed to go back on what he has said or done when it would be unjust or inequitable for him to do so.".

I must make special mention of the authority cited by learned Counsel for the petitioner namely *In Re Tweeds Garages Ltd.* [1962] 1 Ch. 406 where it was held "that the only qualification required of the petitioner was that it was a creditor; and that, where there was no doubt (and there was none here) that the petitioner was a creditor for a sum which would otherwise entitle it to a winding-up order, a dispute as to the precise sum owed was not a sufficient answer to the petition.". The facts there are certainly distinguishable as here there is clearly some confusion as to the amount the petitioner is entitled to under the petition as they had maintained separate accounts unlike the case cited. Also, there is no concrete evidence here that the respondent is insolvent as was found in that case.

Buckley on the Companies Act had said "A winding up petition is not a legitimate means of seeking to enforce payment of a debt which is *bona fide* disputed by the company. ... But, of course, if the debt is not disputed on some substantial ground, the court may decide it on the petition and make the order. ...Great damage might obviously be done to a solvent company by a winding up petition presented by an unreasonable creditor, whose debt the company are able and willing to pay if established, but to whom they *bona fide* believe they are not indebted".

Having considered the matter, I was of the view that the petitioner is not entitled to a winding up order based on the amount in the latest notice dated 11 December 1992 in view of the unexplained discrepancies in their accounts and I was more inclined to give the benefit of the doubt to the respondent, which I find to be solvent, by holding that the amount stated in the statements they had been receiving as the correct balance. I had consequently adjourned the matter for two weeks to enable the respondent to make payment of that amount, which they did, and would have granted the petition for that amount if they had not. After the said payment, I would have dismissed the petition with costs if not for the fact that the petitioner had asked for a long date pending disposal of the appeal in the Supreme Court which I had granted as learned Counsel for the respondent had not appeared on that date to give her views and because I felt that this was the right thing to do in the circumstances should the appeal be decided in favour of the petitioner.